

Bryant  
Miller  
&  
Olive P.A.

**MEMORANDUM**

To: Board of County Commissioners of Leon County

cc: Parvez Alam, County Administrator  
Herb Thiele, County Attorney

From: Cari L. Roth, Special Counsel 

Date: November 14, 2005

Re: Response to Request for Information regarding Fallschase Vesting and Development of Regional Impact Issues

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At the Board public hearing on the proposed Fallschase Development Agreement, Commissioner Sauls asked for a summary of the vesting and substantial deviation criteria for developments of regional impact.

**APPLICABLE LAW AND CASELAW:**

**I. Statutory Provisions**

**General Rule-** Generally speaking, all development approvals must be consistent with the local government's comprehensive plan and the local government land development regulations. Section 163.3194(1)(a), Florida Statutes (F.S.). Land Development Regulations must also be consistent with the Comprehensive plan.

**Grandfather Clause for DRI's-** Chapter 163 also contains a "grandfather" clause for developments of regional impact (DRI). Section 163.3167(8), Florida Statutes states, in pertinent part, that "Nothing in this act shall limit or modify the rights of any person to complete any development that has been authorized as a development of regional impact pursuant to chapter 380...." The Act referred to is the legislation which requires adoption of a comprehensive plan and consistent land development regulations.

**DRI Substantial Deviation Thresholds-** Chapter 380, Florida Statutes contains the DRI thresholds, as well as standards and procedures for adopting DRI development orders. It also contains procedures for amending a DRI development order. Thresholds are included to

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determine whether the changes are "substantial deviations" which would require further regional review. Some changes are automatically substantial deviations, some are presumed to be, and some changes are excluded from substantial deviation review. Section 380.06(19), Florida Statutes.

Changes which are substantial deviations include:

- an increase in commercial development by 50,000 gross floor area or of parking spaces provided for customers for 300 cars or a 5-percent increase in either of these, whichever is greater [s.380.06(19)(b)9.];
- a 15% increase in the number of external vehicle trips generated by the development above that which was projected during the original DRI review [s.380.0(19)(b)15.];

Changes which are presumed to be substantial deviations include:

- additions of land on which development is proposed [s.380.06(19)(e)3.]; changes proposed for 15% or more of the acreage to a land use not previously approved in the development order. [s.380.06(19)(e)5.a.];
- simultaneous increases and decreases of at least two of the uses in a multiuse DRI which was originally approved for three or more uses even if individually, the changes may require substantial deviation review. [s.380.06(19)(e)5.c.]

Changes which are not substantial deviations include:

- changes to the name of the project, the developer, or owner;
- changes to minimum lot sizes,
- changes to the configuration of internal roads that do not affect external access points,
- changes to building design or orientation that stay approximately within the approved area designated for such building and parking lot;
- and changes required to conform to federal, state or regional permitting agencies, provided that the changes do not create additional regional impacts. [s.380.06(19)(e)2.]

## II. Applicable Court Cases

Two court cases have addressed if changes to a DRI remove the vesting for a DRI and subject it to the later adopted provisions of a comprehensive plan. Initially, the First District Court of Appeal, in the case of Edgewater Beach Owners Association, Inc. v. Walton County Florida, 833 So.2<sup>nd</sup> 215 (Fla. 1<sup>st</sup> DCA 2002), determined that only changes which trigger

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substantial deviation review would trigger a loss of vesting and a requirement to comply with the comprehensive plan.

However, the same court revisited the issue in a 2004 decision. In Bay Point Club v. Bay County, 890 So.2<sup>nd</sup> 256 (Fla 1<sup>st</sup> DCA 2004), Rev. den., 903 So.2<sup>nd</sup> 936 (Fla. 2005), the Court rejected the distinction between substantial and non-substantial deviations made in the Edgewater decision. It separated the issues of whether changes to a DRI must undergo substantial deviation review from the issue of whether a change must comply with a later adopted comprehensive plan. In this decision the Court stated that a DRI's vested right is in completing development authorized by the original DRI. Proposed changes that are not required to undergo substantial deviation review must still obtain approval from the local government, and must comply with the comprehensive plan.

### III. Previous Vesting Analysis:

The County Attorney has previously provided the Board with an extensive analysis of the extent of the Fallschase DRI vesting vis-à-vis the comprehensive plan and environmental regulations of the County, a copy of which is attached. These conclusions are based on a series of declaratory statements issued by the Department of Community Affairs on the scope of DRI vesting under section 163.3167(8), Florida Statutes. The conclusions, which are on page 11 of the attachment, are repeated below:

1. Any ordinances or development requirements in effect at the time that the development order was adopted in 1974 are applicable to the project.
2. A persuasive argument can be made that any requirements adopted by Leon County during the period between adoption of the development order and the adoption of the 2010 Comprehensive Plan may be applied to the project to the extent that the density and intensity approved in the development order is not affected. This would include the Environmental Management Act, adopted prior to the adoption of the comprehensive plan, and non-substantive amendments to that act that have occurred subsequently.
3. Ordinances adopted after the adoption of the 2010 Comprehensive Plan that are referenced in the plan, including the SDZ, may not be applied to the project to the extent that they materially or substantially affect the developer's ability to complete the development authorized in the development order.
4. Regardless of the outcome of any arguments concerning vesting or the application of equitable estoppel, the concerns raised about the potential flood hazards that may be created by the project must be addressed. The County has authority to require this both under the stormwater ordinance (Ord., No. 73-10) in effect when the development order was approved, and under general principles recognized by the Department of Community Affairs and the courts

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creating what amounts to an exception to vesting in the case of such safety hazards.

5. The application of equitable estoppel to the project is far from clear cut. The vagueness of the project outlined in concept in the ADA, the language of the DA concerning compliance with ordinances, the conduct of the parties and the fact that compliance with the Environmental Management Act was achieved, all support the conclusion that equitable estoppel should not apply in this case. The application of the doctrine is, however, fact specific and as the facts appear to be contested, further proceedings would be required.

## FALLSCHASE DATA

### I. The Original DRI

The original DRI development order is gleaned from the application for development approval (ADA). Approval of the application authorized 2572 residential units (a combination of housing types- 16 single family, 163 cluster homes, 2,112 condominiums, 280 multi-family), office development of 850,000 square feet on 26.4 acres<sup>1</sup>, and commercial development on 25.4 acres. The DRI contains a Phasing Schedule for the development and delineates the total amount of acreage of each land use to be built in each of the five development phases. The total of commercial acreage to be built out, as the sum of each amount allocated for each phase, is 25.4 acres. No build-out dates were included in the approval nor were there any dates associated with the five phases.

Commercial square footage is mentioned in the ADA's General Description of Development (paragraph 15.) "The Commercial Center is planned to serve the immediate needs of the residents of this and surrounding development. A variety of stores are planned for well within an 180,000 sq. ft. shopping complex and adjacent commercial sites." A transit station was included in the original ADA and authorized to occupy 8.3 acres of the 25.4 commercial acres. The ADA does not establish a square footage limit for commercial uses on the 25.4 acres.

The Development of Regional Impact Evaluation by the Northwest Florida Regional Planning Agency, which was accepted and approved by the County Commission in its Resolution approving the proposed DRI refers also to "a 180,000 sq. ft. shopping complex..." in a description of user characteristics of the development.

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<sup>1</sup> Office development was later reduced to 425,000 sq. ft. in County documents. The property owner applied for and was granted a vesting certificate for 425,000 sq. ft. of office development.

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## II. The PUD Concept Plan

The PUD concept plan approved in 1973, a few months in advance of the DRI approval, assigned zoning categories to the uses in the PUD. C-1 Neighborhood zoning was assigned to the commercial acreage. At the point of approval, C-1 Neighborhood zoning authorized multi-story buildings and contained no Floor Area Ratio (FAR) limitations. C-1 zoning authorized indoor theatres as well as a variety of commercial uses. The PUD concept plan approval states "The commercial center is planned to serve the immediate needs of the residents of this and surrounding development. A variety of stores are planned for in the retail shopping area totaling approximately 180,000 sq. ft." Section 5.a. of the PUD Concept states that the PUD Ordinance requires a minimum of two percent (2%) and a maximum of ten percent (10%) of commercial development in order to qualify as a PUD. The Report states, "Our plans call for 25.4 acres of commercial development, or 3% of the total acreage." Additionally, up to three (3) convenient commercial stores located within the residential areas were authorized with each building not to exceed 5,000 square feet. The PUD Concept Plan also describes as an allowable use, a mixed use area around the lake permitting a combination of residential and non-residential uses which was not permitted by any then existing zoning category. No additional acreage was assigned to this category and the acreages assigned to residential, commercial and office add up to the total acreage approved by the PUD, so it appears that the land uses in the mixed use were included in those maximum totals for those three uses.

## III. Concurrency Management Estimates

County Staff has estimated the amount of commercial square footage of this DRI for several years in order to keep this and other vested projects properly projected in the County's transportation concurrency management system. The vested commercial development has been assumed to be equivalent to approximately 320,000 sq. ft. of commercial development for the purposes of capacity reservation in the County's Concurrency Management system. For these purposes, staff has used an assumption of 12,000 sq.ft. of commercial development per acre and included the potential for 15,000 square feet of convenience commercial referenced in the previous paragraph. Office development was estimated at 425,000 sq. ft. and residential development was estimated for 2572 residential units.

These assumptions have produced a reservation number of approximately 3600 p.m. peak hour trips associated with this development. These trips are a planning figure and are not a measure of vesting under applicable law. If the original traffic analysis was complete, changes in external trips are one measure of whether a DRI modification is a substantial deviation. See Section 380.0(19)(b)15., F.S. The traffic analysis in the ADA for the original DRI was very limited and estimated only the impacts of the residential development.

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#### IV. Applicant's Proposal and Position on DRI Vesting

The Applicant's proposal as contained in the proposed Development Agreement is for a reduction in residential units to 1,514 residential units, a reduction in office to 50,000 square feet of office development, and for 850,000 sq. ft. of commercial development. The plan presented to the Commission includes a movie theatre of unspecified size as part of the commercial development, and a revision of both the internal roadways and access points to county and state roads. The proposal has many aspects that do not comply with the County's current EMA or Comprehensive Plan.

The Applicant takes the position that the development program in the proposed Development Agreement is:

- (1) Within the scope of the original DRI approval and therefore, not a change that triggers requirements to modify the DRI development order or conduct a substantial deviation analysis;

And that development area within the original DRI is:

- (2) Vested from the application of the Comprehensive Plan in all aspects, (not just for intensity and density of land uses); and
- (3) Vested from all provisions of the EMA or other Codes not in existence at the time of DRI approval.<sup>2</sup>

If the Board of County Commissioners wishes to approve the Development Agreement as submitted to the Board, the Board of County Commissioners should indicate its agreement with the Applicant's position on the three items listed above regarding vesting. The Applicant's proposed Development Agreement contains such language.

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<sup>2</sup> Property added in the 2005 amendment to the DRI development order is expressly subject to the current comprehensive plan and EMA and all other Code provisions.

## Board of County Commissioners Agenda Request 15

**Date of Meeting:** February 25, 2003

**Date Submitted:** February 20, 2003

**To:** Honorable Chairman and Members of the Board

**From:** Herbert W.A. Thiele, Esq. County Attorney

**Subject:** Determination of " Vested Rights" for FallsChase Development of Regional Impact

**Statement of Issue:**

Determination of whether or not the FallsChase Development of Regional Impact (" DRI" ) is exempt from the current Leon County Land Development Regulations (but still " vested"for consistency and concurrency purposes).

**Background:**

The FallsChase DRI includes approximately 624 acres located along Buck Lake Road. The project includes frontage on Mahan Drive (U.S. 90) and on Lake Lafayette. In 1973, the FallsChase DRI received approval from the Board of County Commissioners as a DRI by a resolution approving the Northwest Florida Regional Planning Agency's Report on the proposed development. Also in 1973, the Board approved a Planned Unit Development (" PUD" ), rezoning the FallsChase property to provide for implementation of the approved DRI. The approved PUD included the development of 2,572 dwelling units, 425,000 square feet of office space on approximately 29 acres, and approximately 25 acres of commercial land use.

On January 14, 1975, the Board approved, by adoption of a local ordinance, the establishment of the FallsChase Special Taxing District to provide the development with certain mechanisms to finance infrastructure improvements. On April 9, 1979, Leon County Public Works, Division of Environmental Services, issued Clearing and Development Permit # 852, allowing the construction of some of the FallsChase infrastructure, including the existing roadway within the DRI. Over the next several years, the FallsChase Special Taxing District financed the building of roads and the installation of water and sewer infrastructure on a portion of the property to support the initial development phase.

On September 18, 1980, the Tallahassee-Leon County Planning Commission approved a preliminary plat for 155 lots, constituting Phase I-A within the FallsChase Development PUD. This preliminary plat approval encompassed approximately 73 acres. This preliminary plat predated the existing site plan process currently required for subdividing land.

The Board accepted a final plat for recording by the Clerk for a portion of the area covered by the 1980 preliminary plat on August 17, 1984. This recorded 33-lot plat totaled approximately 48 acres, and is recorded in Plat Book 9, Page 40, Leon County Public Records.

On February 4, 1998, after full site plan review, a 144-lot site plan was approved. The approved site plan showed a reconfiguration of the lots that achieved compliance with the County's Environmental Management Act, governing development on severe slopes and development below the 51-foot contour line. The Leon County Department of Growth and Environmental Management issued permit number LEM 97000222 on April 9, 1998, to construct the infrastructure required by the approved site plan. However, no construction associated with this permit commenced and the permit subsequently expired three years after issuance.

Subsequent to the adoption of the County's 2010 Comprehensive Plan in 1990, the owner of FallsChase requested a vested rights determination for the proposed development, pursuant to the provisions of the County's Vested Rights Review Ordinance. In October of 1991, County staff issued a Certificate of Vested Rights (VR0167LC) for the PUD, consistent with the development approvals that had been received previously through the DRI and PUD processes. This Comprehensive Plan vesting, for purposes of Comprehensive Plan consistency and concurrency management compliance, remains valid based on the PUD approved Chapter 380.06, Florida Statutes; the DRI Development Order, and the accompanying PUD zoning. The

vesting certificate states that "a final PUD must be filed and approved for subsequent phases and all development must meet the Environmental Management Act and land development regulations in place at that time."

On October 14, 1997, the Board approved the conversion of the FallsChase Special Taxing District to the FallsChase Community Development District ("CDC") consistent with the enabling legislation and attendant regulatory provisions provided in Chapter 190, Florida Statutes. The Florida Department of Community Affairs monitors all CDCs that are established through the provisions of Chapter 190, Florida Statutes. Through the CDC, FallsChase has the mechanisms to collect special property assessments to finance improvements for the benefit of the District. Other CDCs in the County proper include the Southwood and Piney Z developments, both of which are located in the jurisdiction of the City of Tallahassee.

On November 19, 2002, the Board approved a replat of the 1980 recorded plat of FallsChase Units 1A and 1B. Unit 1A was approved as West Village-Unit 1A, less lots D-7 and H-6, for a total of 83 lots, and West Village-Unit 1B was approved for 34 lots. Both approvals were given on the basis that the plat constituted a replat of lots approved under subdivision approval processes in 1980 and that the boundary of said replat already contained the infrastructure required in 1980 to serve the development. The Board noted that its approval did not constitute a waiver by Leon County of its position that the remainder of the FallsChase DRI must fully comply with all existing regulations, ordinances of the County, and statutes in effect at the time of any further development order or development permit applications within the FallsChase DRI boundaries. To date, development of the property has included a roadway system and utilities (water, sewer and electric) to serve approximately 70 acres of the project. However, only four (4) single family homes have been built on the 33 lots platted in 1980.

Further detailed plans for the remaining 554 acres of FallsChase have not been provided to the County to date, other than a conceptual master plan that was submitted to staff on May 23, 2002, as a proposed development agreement with the County. Staff's preliminary review of this proposal and responses to the applicant's agent are discussed in the Analysis section.

It has been the position of the County Attorney's Office, as stated in numerous previous agenda items, that the FallsChase DRI is vested only from the consistency and concurrency provisions of the Comprehensive Plan by virtue of the vesting certificate issued in October of 1991. As you are aware, a land use attorney hired by FallsChase has previously issued a contrary opinion on the vesting issue. That opinion has apparently previously been distributed to the Board. The legal analysis presented in this agenda item was produced by the County Attorney's Office with assistance from the statewide law firm of Holland & Knight, P.A. In addition, County staff has conducted extensive research and compiled an exhaustive chronology of the history of FallsChase approvals, which is available from either the County Attorney's Office or Community Development for your review.

#### Analysis:

#### Vested Rights

For purposes of the FallsChase DRI project, there are two bases on which an exemption from regulations may be acquired. Vested rights may be acquired by statute or as a result of the application of common law principles of equitable estoppel. FallsChase has claimed that both the concepts are applicable to the project.

#### Statutory

The statutory basis for the claim that a project has "vested rights" is section 163.3167(8), Florida Statutes. That section provides as follows:

(8) Nothing in this act shall limit or modify the rights of any person to complete any development that has been authorized as a development of regional impact pursuant to Chapter 380 or who has been issued a final local development order and development has commenced and is continuing in good faith. 163.3167(8), Florida Statutes.

Chapter 163 requires local governments to adopt a comprehensive plan and implementing land development regulations. It follows, then, that the "vested rights" that may be acquired pursuant to section 163.3167(8) would protect a development from having to comply with a subsequently adopted comprehensive plan or land development regulations that implement the comprehensive plan under appropriate circumstances. This provision has been interpreted in this fashion. *Edgewater Beach Owners' Association, Inc. v. Walton County, et al*, (Fla. 1<sup>st</sup> DCA, December 19, 2002).

It is clear that the Leon County Board of County Commissioners approved by resolution the Lake Lafayette Development,



or during construction.

DRI development orders and final local orders establish specific development rights that must be recognized and respected by both the developer and the local government. Certain development rights that would be specifically protected by Subsection 163.3167(8) would include but not necessarily be limited to the following: authorized land use; density or intensity of development; staging or phasing of development; and other conditions of development or mitigation that are specific to each DRI development order issued.

*General Development Corp. v. State Department of Community Affairs*, 11 FALR 1032, 1037 (DCA 1998). See also, *Gulfstream Development Corp. v. Fla. Department of Community Affairs*, 11 FALR 1047 (DCA 1988). The DCA has further stated that:

[T]he exact extent to which . . . rights to complete its DRI are "vested" under section 163.3167(8), F.S., is dependent upon the terms and provisions of the DRI development order. Based upon the exact language in the . . . DRI development order, certain development rights may not be exempted from compliance with the corresponding portions of the new comprehensive plan or land development regulations adopted thereunder.

*American NewLand Associates v. State Department of Community Affairs*, 11 FALR 5205, 5214 (DCA 1989).

Further, the Department issued an advisory opinion to the County interpreting these orders as they apply to the FallsChase DRI (Attachment #2). That opinion also concludes that the County may apply subsequently-adopted Land Development Regulations to the DRI to address health, safety, and welfare concerns.

In the case of the FallsChase project, there is an approved "development order" although it does not contain specific terms and conditions. Rather, the development order approved by the Leon County Board of County Commissioners was in the form of a resolution that referenced the report from the Northwest Florida Regional Planning Agency. It can be assumed, however, that the Application for Development Approval filed by the developer which formed the basis for the Regional Planning Agency report also form the basis for the resolution of the Leon County Board of County Commissioners.

Although the developer has indicated that the original PUD application contained a detailed plan of development for the project (see Pelham letter) this does not appear to be the case. Most of the documents that were submitted by the developer were either "conceptual" or "preliminary". In fact, it appears that the developer himself has acknowledged that the PUD/DRI approval did not include any specific plan of development that he would be required to follow and that the PUD ordinance permitted him to develop plans for different phases of the development so long as he stayed within the densities approved. (Attachment #3, Memorandum from Diana Sawaya-Crane to Mike Garretson, May 15, 1981 at page 3.)

Based upon our review, and applying the principles set forth in the *Edgewater Beach Owners' Association, Inc. supra* and the cited DCA Declaratory Statements, it appears that the project is vested only for the densities and intensities to a maximum of 2572 residential units, 425,000 square feet office, and 25.4 acres of commercial use, plus an additional 15,000 square feet of aggregate commercial use at 3 locations, containing no more than 5,000 square feet commercial at each location within the residential component. Additionally, it appears that the plat approved in 1980 for the first phase of the project, that then consisted of some 155 single family lots, is vested pursuant to the statutory provision. There do not appear to be any other details of the future development that were sufficiently concrete at the time of approval to warrant a finding that they are vested. The County determined that the project is vested from concurrency and consistency with the Comprehensive Plan. Therefore, Land Development Regulations specifically required by the 2010 Comprehensive Plan would not apply to the extent they would negatively impact the project densities and intensities.

#### Common Law

In addition to the statutory vesting discussion set forth above, there is a question of whether common law equitable estoppel principles may be applicable in this case as well. Under this doctrine, vested rights can be established if the elements of equitable estoppel are met. These elements include the following:

1. Good faith reliance by the property owner,
2. On an act or omission of the government,

3. A substantial change in position or the incurring of extensive obligations and expenses such that it would be inequitable and unjust to destroy the right acquired.

*Hollywood Beach Hotel, Co. v. City of Hollywood*, 329 So.2d 10 (Fla. 1976).

The developer contends that the common law doctrine of equitable estoppel operates to vest the entire FallsChase property and that the Environmental Management Act and the SDZ, therefore, cannot be applied. (Pelham letter, September 24, 2002.) In support of the argument that equitable estoppel is applicable in this case, a number of "undisputed facts" are set forth as are a number of acts that are purported to be in reliance on action undertaken by Leon County. Based upon our review of the extensive materials contained in the County files, we cannot conclude that the facts are undisputed, nor can we verify the "acts of reliance" or the expenditures that have been suggested by the developer as supporting this claim. As noted previously, the current owner of the property is Lafayette Hills, Inc. The courts have held that a transferee of property has no standing to assert a claim of equitable estoppel unless the transferee can establish some independent act of reliance on promises made by the government. *Equitable Resources, Inc. v. County of Leon*, 643 So.2d 1112, 1118 (Fla. 1<sup>st</sup> DCA 1994). None of the material that has been submitted addresses the question of whether Lafayette Hills, Inc. claims any acts of reliance. It is difficult to see how such claims could in fact be made given the history of the development.

Another area of significant dispute will be whether it was contemplated at the time that the DRI development order was approved by resolution that further review would be required and that compliance with ordinances and requirements in existence at the time of that review would be applicable. The "development order" itself does not contain any specific conditions. The ADA refers to the need to comply with various ordinances and regulations, but the language is ambiguous. It is subject to the interpretation that further review of the development would be required and that ordinances and regulations in effect at the time of that review would be applicable. The parties in the course of dealing provide support for this position. The conceptual nature of the development proposal contained in ADA and the apparent position taken by the developer concerning the lack of specificity of the development plan lend support to the position that further review under the then in effect ordinances was contemplated. In addition, when the site plan review and environmental permitting for Unit 1A occurred in 1998, compliance with the Environmental Management Act was achieved. This certainly demonstrates that compliance with the Environmental Management Act can reasonably be achieved. But it also weakens any argument the developer may have that it has been relying, to its detriment, on the original approval and the contention that approval precluded further regulation of any kind on the project. To establish equitable estoppel, it must be shown that there was "good faith" reliance on the government act. *Hollywood Beach Hotel, Co., supra* at pp. 15-16. Based upon the material that has been reviewed the good faith nature of any claimed reliance is in question.

The argument that the County is estopped from applying the Environmental Management Act to the phases of the project other than that which was essentially reviewed and approved as Unit 1A (now Unit 1A and IB) presupposes that the application of this doctrine would be necessary to prevent some type of injustice. In other words, it presupposes that the County or the County staff is attempting to prohibit the developer from completing those portions of the DRI authorized by the development order. As we understand it, the County has suggested that the Environmental Management Act be applied to the project to the extent that the DRI vested density and intensity is not affected. Assuming this is the case, it is not clear what "right" the developer has acquired that would be adversely affected such that equitable estoppel could be established.

It is important to note that the County in 1973 had a stormwater ordinance in effect that would certainly apply to the project. Leon County Ord. No. 73-10. That ordinance contains the following provision:

Section 3.0 Responsibility for erosion, sedimentation, runoff and debris control. No person or governmental agency shall change or allow to be changed the contour, topography, use, or vegetative cover of land owned or controlled by him in such a manner that it would cause surface waters flowing from said lands to inundate, erode, deposit sediment on or otherwise damage downstream or downhill property, real or personal, owned by others without their consent, or rivers, lakes, streams or other water courses without the consent of the applicable governmental authority.

This ordinance, which clearly would be applicable to the project under the interpretation favored by the developer, appears to provide sufficient authority to address many of the issues that would also be addressed by the Environmental Management Act.

#### Other County Authority

As a result of the extensive review process that has occurred over the course of the discussions of this project, and particularly the review of various submittals that has occurred over the past several years, concern has arisen on the part of the staff as to the feasibility of the Master Stormwater Concept Plan that has been submitted. These concerns are detailed in a memorandum from Tom Ballentine, P.E., Senior Environmental Engineer, to Gary W. Johnson, Director, Community Planning Development dated June 25, 2002. It is apparent from the memorandum that the development, as currently outlined in the proposals before the County, poses a substantial risk of flooding downstream property owners. Regardless of the validity of the arguments advanced by the developer concerning the vested status of the project, we know of no authority that would require the County to allow the developer to proceed with a project that creates a flood hazard, either on-site or off-site. The developer has not addressed these concerns and until that has been accomplished, we do not believe that the County would be required to approve any further development activities on the site. The existence of this type of "exception" to vesting has been recognized by the DCA and has been discussed, although not applied, by the courts. *See, Huckleberry Land Joint Venture v. State, Department of Community Affairs*, 11 FALR 5706, 5716 (DCA 1989), *Hollywood Beach Hotel Co. v. City of Hollywood*, *supra* at p. 16.

#### Review of FallsChase Conceptual Master Development Plan

On May 23, 2002, Agents for FallsChase delivered to Leon County a conceptual master plan for buildout of the entire DRI. Staff prepared a detailed environmental analysis of the plan, which is attached hereto as Attachment #1. Staff's analysis was conveyed to the agent by letter dated September 3, 2002. To date, FallsChase has not responded with necessary engineering, hydrologic, or geologic data to support the viability of the conceptual plan. The following specific information must be submitted for the County's environmental staff to further evaluate the proposal:

1. Beginning at Upper Lake Lafayette's lake bottom up to an elevation of 51.0 feet NGVD (National Geodetic Vertical Datum), provide NGVD Stage (1 foot increments) vs. Storage Volume Tables for Upper Lake Lafayette for:
  - (a) the existing undeveloped condition with Lafayette Sink unblocked, and
  - (b) the post developed condition with fill placed in the Lake for the home sites and stormwater facilities and Lafayette Sink impounded to create a lake with the proposed normal pool elevation.
2. Provide a scaled plan view of the proposed post-developed topography of the Lake with the proposed fill placed therein. Indicate on this plan view the locations of cross-sections used in the stage-storage calculations. Also provide the volume calculations to produce the above stage-storage tables.
3. Based on these two stage-storage tables, please explain why, under near flooding or extreme flooding conditions, there will be no adverse changes in the rate, volume or duration of discharge and flooding to areas downstream of Upper Lake Lafayette.

#### Conclusion

Based upon our review of the project files and the applicable law, we have concluded as follows:

1. Any ordinances or development requirements in effect at the time that the development order was adopted in 1974 are applicable to the project.
2. A persuasive argument can be made that any requirements adopted by Leon County during the period between adoption of the development order and the adoption of the 2010 Comprehensive plan may be applied to the project to the extent that the density and intensity approved in the development order is not affected. This would include the Environmental Management Act, adopted prior to the adoption of the comprehensive plan, and non-substantive amendments to that act that have occurred subsequently.
3. Ordinances adopted after the adoption of the 2010 Comprehensive Plan that are referenced in the plan, including the SDZ, may not be applied to the project to the extent that they materially or substantially affect the developer's ability to complete the development authorized in the development order. Regardless of the outcome of any arguments concerning vesting or the application of equitable estoppel, the concerns raised about the potential flood hazards that may be created by the project must be addressed. The County has authority to require this both under the stormwater ordinance (Ord. No. 73-10) in effect when the development order was approved, and under general principles recognized by the Department of Community Affairs and the courts creating what amounts to an exception to vesting in the case of such safety hazards.

4. The application of equitable estoppel to the project is far from clear cut. The vagueness of the project outlined in concept in the ADA, the language of the ADA concerning compliance with ordinances, the conduct of the parties and the fact that compliance with the Environmental Management Act was achieved, all support the conclusion that equitable estoppel should not apply in this case. The application of the doctrine is, however, fact specific and as the facts appear to be contested, further proceedings would be required.

**Options:**

1. Determine that FallsChase Development of Regional Impact (DRI) is not exempt from the current Leon County Land Development Regulations, in accord with conclusions 1 thru 4 above.
2. Do not determine that FallsChase Development of Regional Impact (DRI) is not vested from the current Leon County Land Development Regulations.
3. Board direction.

**Recommendations:**

Board direction.

**Attachments:**

1 September 3, 2002, letter from Leon County Environmental Compliance Division to Lee Vause re: FallsChase Master Plan, with attached memorandum.

2 July 2, 2002, letter from David Jordan, Deputy General Counsel, Department of Community Affairs, to the County Attorney's Office.

3 May 15, 1981, Memorandum from Diana Sawaya-Crane to Mike Garretson.

